UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

AMM, *Petitioner*, v. **BOBBY THOMPSON,** Warden, South Texas ICE Processing Center; **MIGUEL VERGARA,** Field Office Director, San Antonio Field Office, United States Immigration and Customs Enforcement; **TODD M. LYONS,** Acting Director, United States Immigration and Customs Enforcement; **KRISTI NOEM**, Secretary of Homeland Security; **PAMELA BONDI,** United States Attorney General, *in their official capacities,* *Respondents.*	No. 5:25-cv-01210-FB **PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR TEMPORARY RESTRAINING ORDER**

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR TEMPORARY RESTRAINING ORDER

Petitioner AMM respectfully submits the following reply in support of her petition for writ of habeas corpus and motion for temporary restraining order (TRO) seeking her release.

I. INTRODUCTION AND RECORD CORRECTIONS

A. Ms. M's habeas petition is of critical importance because her detention is unconstitutional, unjustified, and cruel.

Ms. M is an asylum seeker who has lived in the United States since 2023. (Dkt. No. 1 ¶¶ 13, 16). As both parties agree, she has a pending affirmative asylum application. (Dkt. No. 14 at 1; Dkt. No. 1 ¶ 16; Dkt. No. 1-2). Additionally, Ms. M is neither a flight risk nor a danger. She has no criminal history, has lived in the United States for two years, and has a strong interest in seeing her asylum claim through to its resolution. (*See* Dkt. No. 1 ¶¶ 13, 16–17, 31–32). Furthermore, Ms. M is an elderly woman with multiple serious medical conditions whose health is rapidly deteriorating in detention. (*See id.* ¶¶ 13, 20–30; Dkt. No. 5 at 2–4; Dkt. No. 8-1; Dkt. No. 13). Ms. M has suffered several medical emergencies during the few weeks she has been detained, and was even hospitalized. (*Id.*) This is during a year where ICE has already had the highest number of deaths in its custody on public record. (Dkt. No. 5 at 15). Thus, granting relief in this case is critical.

B. Because of the urgency of her habeas matter, Ms. M seeks to correct the record.

Given the urgency of this matter, Ms. M seeks to ensure that this Court is able to rule on a complete and accurate record. Respondents' briefing raises a number of inaccuracies that interfere with this Court's ability to rule on Ms. M's habeas petition and her motion for a temporary restraining order. (*See* Dkt. Nos. 14 and 15). In particular, Ms. M clarifies that she has a pending asylum application, as Respondents acknowledge. (Dkt. No. 14 at 1).

First, Respondents' assertion that Ms. M has put forth non-habeas claims that should be dismissed or severed is puzzling. (Dkt. No. 15 at 1). As is apparent from the habeas petition, there are no non-habeas claims: the only remedy Ms. M seeks is release, whether ordered by this Court immediately or pursuant to a bond hearing before this Court or an Immigration Judge. (Dkt. No. 1 at 1, 16).

Similarly, Respondents' representation that "Petitioner . . . concedes that she . . . has been detained in post-removal-order ICE custody since September 2025 subject to her final order of removal" (Dkt. No. 14 at 1) is plainly false. As this Court can see, Ms. M never makes any reference to any removal order in her habeas petition or TRO motion. (Dkt. Nos. 1 and 5).

Respondents expressly concede that Ms. M has a pending asylum application in their briefing. (Dkt. No. 14 at 1). Respondents' counsel also communicated to Ms. M's counsel that Ms. M should be referred to asylum proceedings before the Immigration Judge under

Respondents' own regulation. (*See* Ex. 1 (citing 8 C.F.R. § 217.4(a)(1).)[1] Yet despite these concessions, they repeatedly and perplexingly claim that Ms. M is also in post-removal-order detention. (*See, e.g.*, Dkt. No. 14 at 1). Not so.

On the first page of Respondents' response opposing Ms. M's TRO motion, Respondents state both that Ms. M "has a pending asylum application" and that Ms. M "has been detained in post-removal-order ICE custody since September 2025 subject to her final order of removal." (Dkt. No. 14 at 1). Respondents double down on acknowledging Ms. M's active asylum process on the second page of that response, asserting that Ms. M "is being given sufficient procedural due process provided to her by statute: the ability to apply for asylum." (*Id.* at 2). Yet Respondents claim in that very same brief that "Petitioner did not claim fear or otherwise challenge his [*sic*] INA § 217 removal order when served with notice." (*Id.* at 4 n.1).

This Court need not be distracted by the logical and factual inconsistency of Respondents' briefing. Despite Respondents' misplaced focus on Visa Waiver Program (VWP) documents, Ms. M already claimed fear by *affirmatively* applying for asylum in 2023. (*See* Dkt. No. 1 ¶ 16). The fact that she did not sign documents that she did not understand, in a language that she does not fully know, and instead requested to speak with her counsel when presented with such documents, does not obviate her pending asylum application. (*See* Ex. 2, ¶¶ 4–9; Dkt. No. 14-1 at 5 (stating the Deportation Officer explained the documents to Ms. M in English, without an interpreter); Dkt. No. 15-1 at 5 (same)). Additionally, counsel was only

[1] The Court may consider Petitioner's evidence submitted with her reply. "A reply brief is generally limited to addressing matters presented in a motion and response." *Lynch v. Union Pac. R.R. Co.*, 2015 WL 6807716, at *1 (N.D. Tex. Nov. 6, 2015). But courts can consider new evidence on reply where, for example, a reply brief "and related evidence are responsive to arguments raised by Defendant in its Response Brief," because this "is not a situation in which a new issue was raised for the first time in a reply." *HWY 67 Dealership JV v. Depositors Ins. Co.*, No. 3:22-CV-00784-L, 2024 WL 5166651, at *3 (N.D. Tex. Mar. 15, 2024). Ms. M's reply and supplemental evidence address only matters Respondents raised in their responses.

informed of these documents on October 3, 2025, over a week after they were allegedly served on Ms. M and explained to her in English only. (*See id.*).[2]

Likewise, while Respondents claim in unequivocal terms that "it cannot be disputed that [Ms. M] has a final order of removal that entitles the government to detain her unless and until Petitioner shows good cause that her removal is unlikely" (Dkt. No. 14 at 5), this is simply inaccurate given her active asylum process. (Dkt. No. 1 ¶ 16.) As Respondents concede, Ms. M has a pending asylum application, not a final removal order. (*See* Dkt. No. 14 at 1).

Respondents' internally inconsistent characterization of Ms. M's timeline in detention further reveals why Ms. M cannot be in post-removal-order detention. Respondents claim that "Petitioner challenges in district court the government's decision to detain her for the purpose of executing her removal order under the statutes governing the VWP" (Dkt. No. 15 at 11), yet acknowledge that she was detained on September 15, 2025, prior to being notified on September 16, 2025 "that she would be processed for removal" (Dkt. No. 15 at 3). Respondents' apparent assertion that Ms. M was detained pursuant to a "final removal order" that by their own account did not exist until the following day is nonsensical. This contradiction further illustrates why Ms. M cannot be in post-removal-order detention under 8 U.S.C. § 1231.

II. ARGUMENT

A. Ms. M is detained under 8 U.S.C. § 1226.

Because Ms. M has a pending asylum application, Ms. M is detained under 8 U.S.C. § 1226, not 8 U.S.C. § 1231. Immigration detention is governed by select provisions of the

[2] To ensure an accurate record, the Court is also advised that Respondents cite to pages in their exhibits (Dkt. No. 14-1 and Dkt. No. 15-1) that apparently do not exist. Dkt. No. 14-1 and Dkt. No. 15-1, which appear to be duplicates of each other, are each 5 pages. Yet, Respondents cite several times to pages 6 through 8. (*See* Dkt. No. 14 at 2; Dkt. No. 15 at 3.) Since these pages are nonexistent in Respondents' filings, they cannot support propositions for which they are cited.

Immigration and Nationality Act (INA) in which Congress expressly grants the government authority to detain certain immigrants. *See* 8 U.S.C. §§ 1226 and 1231. The detention of an immigrant during her immigration proceedings, including asylum proceedings, is governed by 8 U.S.C. § 1226. *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018). The detention of an immigrant after the completion of her removal proceedings, when she has been issued an *administratively final* order of removal, is governed by 8 U.S.C. § 1231. By contrast, the Visa Waiver Program (VWP) statute does not grant the government any detention authority. *See* 8 U.S.C. § 1187; (*see also* Dkt. No. 1 ¶¶ 41–46).

Under 8 U.S.C. § 1226(a), an immigrant "may be arrested and detained pending a decision on whether the alien is to be removed from the United States." Immigrants detained under this provision are afforded bond hearings. *See* 8 U.S.C. § 1226(a)(2)(A). 8 U.S.C. § 1231, however, applies when an immigrant has been "ordered removed." *See* 8 U.S.C. § 1231(a)(1)(A). An "order of deportation" is the "order of the special inquiry officer, or other administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). Further, an order of removal "shall become final" upon either "a determination by the Board of Immigration Appeals affirming such order" or "the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. § 1101(a)(47)(B).

As Ms. M pleaded clearly in her petition, and as Respondents agree, Ms. M has a pending asylum application. (*See* Dkt. No. 1 ¶ 16, Dkt. No. 1-2, Dkt. No. 14 at 1). Therefore, any "order of removal" is not and cannot be final until that application is adjudicated and becomes administratively final (*i.e.*, until Ms. M waives appeal or the time to appeal has lapsed). 8 U.S.C. § 1101(a)(47)(B). As Respondents concede, the documents "served" on Ms. M were merely "allegations" and "charges" rather than anything resembling a final order of removal. (Dkt. No. 14 at 4–5). Respondents' briefing in response to Ms. M's petition and motion for TRO is almost entirely inapposite, because Respondents fundamentally misunderstand Ms. M's detention. Because Ms. M is not in post-removal-order detention, Respondents' legal argument premised on this incorrect understanding of her detention employs the wrong standards.

Respondents' concession that Ms. M has a pending asylum application, Respondents' own regulation, 8 C.F.R § 217.4(a)(1), and Respondents' understanding of that regulation, communicated late last week, confirm this conclusion. (Dkt. No. 14 at 1; *see also* Ex. 1). The regulation is clear that "an alien who presents himself or herself as an applicant for admission under [the VWP] and applies for asylum in the United States must be issued a Form I-863, Notice of Referral to Immigration Judge, for a proceeding in accordance with 8 C.F.R. § 208.2(c)(1) and (c)(2)." 8 C.F.R § 217.4(a)(1). Ms. M applied for asylum nearly two years ago. (Dkt. No. 1-2). This, along with the fact that Ms. M's asylum application remains pending, is undisputed. (*Id.*; Dkt. No. 14 at 1). Accordingly, Ms. M's asylum case is simply pending referral to an Immigration Judge under 8 C.F.R § 217.4(a)(1). Because Ms. M's asylum proceedings are still ongoing, it is impossible for her to be detained under 8 U.S.C. § 1231. Thus, Ms. M is detained under 8 U.S.C. § 1226.

B. This Court has jurisdiction over Ms. M's habeas claims.

In another series of confusing assertions, Respondents claim that Ms. M is challenging her final administrative order of removal and that this Court lacks jurisdiction to hear such a claim. (*See, e.g.*, Dkt. No. 14 at 3; Dkt. No. 15 at 8). Respondents' argument that this Court lacks jurisdiction over Ms. M's habeas petition is misplaced, however. First, Respondents argue that this Court does not have jurisdiction to enjoin the execution of an order of removal. (*See* Dkt. No. 14 at 3; Dkt. No. 15 at 8). However, as explained above, Ms. M is not subject to an order of removal. Therefore, she is not asking this Court to enjoin any order of removal. Second, Respondents argue that there is "no jurisdiction to direct Respondents to commence removal proceedings against her under 8 U.S.C. § 1229a." (Dkt. No. 14 at 3). This argument is likewise inapposite, as Ms. M is not asking for any such relief from this Court. The only relief that Ms. M seeks is her release.

Further, Respondents concede that "the district court has jurisdiction under § 2241 to review a custody challenge[.]" (Dkt. No. 15 at 3). Ms. M's habeas petition is clearly a custody challenge, as it deals with her detention only. Neither the petition nor the TRO even mentions, much less challenges, any so-called order of removal. Ms. M cannot challenge something that does not exist. Therefore, as both Ms. M and Respondents apparently agree, this Court has jurisdiction to hear Ms. M's habeas case.

C. Ms. M did not waive the due process rights underlying her habeas claims when she entered through the Visa Waiver Program.

Respondents argue erroneously that Ms. M is "not entitled to" due process rights because of the Fifth Circuit's ruling in *McCarthy v. Mukasey*. 555 F.3d 459, 460 (5th Cir. 2009); (Dkt. No. 14 at 2). However, *McCarthy* does not support the proposition that Respondents cite it for. 555 F.3d at 460. The Fifth Circuit, in *McCarthy*, did not hold that "a UK citizen who overstayed the VWP was not entitled to any due process rights beyond an asylum hearing," as Respondents claim. (Dkt. No. 14 at 2). Rather, the *McCarthy* court focused on the narrow question of whether someone who overstayed the VWP period had a due process right to apply for *adjustment of status*. 555 F.3d at 462. The court held that once the VWP participant "violated the terms of the VWP by remaining in the United States for more than ninety days, she was no longer entitled to contest her removal, *other than an application for asylum*." *Id.* (emphasis added). Further, the court held that "due process rights may be waived as long as such waiver is knowing and voluntarily made," and therefore voluntary participation in the VWP waived due process rights to a hearing before an immigration law judge on an application for *adjustment of status*. *Id.* The court premised its decision on the text and clear waiver of the VWP statute, which provides that VWP participants waive the right "to contest, other than on the basis of an application for asylum, any action for removal." *Id.* at 459 (citing 8 U.S.C. § 1187(b)(2)). Importantly, the court did *not* hold that participation in the VWP waives constitutional due process rights involving a fundamental liberty interest, or any rights other than those expressly waived in the statute.

McCarthy has no bearing on the present case. Ms. M did not waive the due process rights underlying her habeas claims, and nothing in *McCarthy* supports any argument to the contrary.

D. Ms. M's detention violates her substantive due process rights.

Ms. M, an asylum seeker who poses neither a danger to society nor a flight risk, is detained in violation of her substantive due process rights. Respondents make no effort to argue that Ms. M is a danger or a flight risk. Nor could they.

Ms. M has no criminal history whatsoever. (Dkt. No. 1 ¶ 32.) She is not a flight risk, because after *affirmatively* applying for asylum she has built up a strong, supportive community here in the United States that includes her daughter, her medical providers, and her coworkers and friends. (*See* Dkt. No. 1 ¶¶ 17, 31–32; Dkt. No. 5 at 11–12.) Additionally, she is highly educated, law-abiding, and motivated to see her asylum process through and comply with every immigration obligation. (Dkt. No. 1 ¶¶ 31–32.)

Respondents have not challenged the reality that neither of the Supreme-Court-sanctioned justifications for immigration confinement—preventing flight and preventing danger to the community—are present in Ms. M's case. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Ms. M's detention, therefore, constitutes a violation of her substantive due process rights, and she should be released immediately.

E. Ms. M's detention violates her procedural due process rights.

Despite posing neither a danger nor a flight risk, Ms. M is detained without a bond hearing in violation of her procedural due process rights. Respondents make little effort to respond to Ms. M's procedural due process claims, leaving undisputed that Ms. M has a weighty liberty interest in freedom from government detention and that the risk of erroneous deprivation is high. (*See generally* Dkt. Nos. 14 and 15). Respondents' bare assertions that their feeble attempt to notify Ms. M of "charges" and "allegations" against her comport with procedural due process hold no weight. Respondents' failure to provide Ms. M with a bond hearing violates her procedural due process rights due to her strong liberty interest and the high risk of erroneous deprivation.

Respondents' cursory remarks about the government's interest fall short. (*See* Dkt. No. 14 at 4–5). The government may have an interest in the enforcement of immigration law and the removal of noncitizens with final removal orders, but neither of those interests cut in favor of continuing to deny Ms. M a bond hearing or detain her without proper procedures. To the contrary, Ms. M also has an interest in the enforcement of immigration law and having her asylum case adjudicated. Further, Ms. M does not have a final removal order. Additionally, as Ms. M does not pose a danger or a flight risk, releasing Ms. M or providing her with a bond hearing will, in fact, benefit the government by reducing the fiscal and administrative burdens of unnecessary detention. Accordingly, procedural due process weighs in favor of Ms. M's release. *See Santiago v. Noem,* 3:25-cv-00361-KC (W.D. Tex. Oct. 1, 2025).

F. The TRO factors, including the risk of irreparable harm to Ms. M, weigh in favor of granting the TRO motion.

As explained above, Ms. M will likely succeed on the merits of her claims that she is being held without bond in violation of the INA and her due process rights. *See Speaks v. Kruse*, 445 F.3d 396, 399–400 (5th Cir. 2006). Moreover, Ms. M faces irreparable harm with each passing hour in detention: not just unlawful detention, but also imminent threats to her health. (*See* Dkt. No. 1 ¶¶ 22–29; Dkt. No. 8-2; Dkt. No. 13).

Respondents do not dispute the irreparable injury to Ms. M, despite acknowledging such injury as one of the TRO factors. (*See* Dkt. No. 14 at 3). Respondents instead claim merely that Ms. M is not likely to succeed on her claims and that the government and the public have a strong interest in enforcing immigration law. (*Id.* at 5). Likewise, Respondents' assertion in their other response brief that conditions of confinement do not form the basis for release under habeas misses the mark (Dkt. No. 15 at 8). This treatment ignores two factors out of the four factor TRO test. (*See id.* at 3); *Speaks*, 445 F.3d at 399–400. This Court must consider such factors: "(2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, [and] (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant." (Dkt. No. 14 at 3 (citing *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).

The imminent injury Ms. M faces in continued detention far outweighs the nonexistent harm to Respondents. (*See* Dkt. No. 5 at 13–16). Ms. M has repeatedly vomited blood and begged for medical care. (Dkt. No. 1 ¶¶ 22–25, 29; Dkt. No. 8-1; Dkt. No. 13). Soon after being detained, she was hospitalized with chest pains and elevated blood pressure and heart rate. (Dkt. No. 1 ¶¶ 25–28.) Last week, another detainee saved Ms. M's life after her throat closed up. (Dkt. No. 8-1; Dkt. No. 13). Given her multiple comorbidities, Ms. M's detention jeopardizes her health, and she fears that more time in detention will cause her to join the long list of people that have died this year while detained by ICE. (Dkt. No. 1 ¶¶ 20–21; Dkt. No. 5 at 14–15.)

A TRO granting Ms. M's release does Respondents no harm, and in fact benefits them. Respondents can enforce immigration laws as Ms. M accesses medical care while pursuing her asylum claim. (Dkt. No. 5 at 15–16). In fact, Respondents benefit from the reduced fiscal and administrative costs of unnecessary detention.

III. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, this Court should grant Ms. M's petition for writ of habeas corpus (Dkt. No. 1) and motion for temporary restraining order (Dkt. No. 5) and order her immediate release or that she be provided with a bond hearing as soon as possible.

Dated: October 7, 2025

Respectfully submitted,

/s/ Kate Gibson Kumar

Daniel Hatoum
Texas Bar No. 24099136
Texas Civil Rights Project
P.O. Box 219
Alamo, Texas 78516
(956) 787-8171 ext. 208
daniel@texascivilrightsproject.org

Kate Gibson Kumar
Texas Bar No. 24137588
Texas Civil Rights Project
P.O. Box 17757
Austin, Texas 78760
(512) 474-5073 ext. 225
kate@texascivilrightsproject.org

CERTIFICATE OF SERVICE

I certify that on October 7, 2025, I served the foregoing document via CM/ECF, which will notify all parties of the filing.

/s/ Kate Gibson Kumar
Kate Gibson Kumar
Attorney for Petitioner